Congress of the United States

Washington, DC 20515

March 10, 2000

BY FACSIMILE

The Honorable Gary S. Guzy
General Counsel
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Guzy:

Thank you for your February 16, 2000 letter responding to our December 10, 1999 letter examining the Environmental Protection Agency's (EPA's) legal authority with respect to carbon dioxide (CO_2). After studying your answers to our questions, we are more convinced than ever that the Clean Air Act (CAA) does not authorize EPA to regulate CO_2. Indeed, we find it amazing that EPA claims authority to regulate CO_2 when the legislative history of the CAA -- particularly in 1990 -- does not support such a claim and when Congress, since 1978, has consistently enacted only non-regulatory laws on climate change and greenhouse gases. Furthermore, some of your answers asserting that EPA has not yet considered certain basic legal issues are not credible.

To make clear why your February 16th letter has only reinforced our conviction that EPA may not lawfully regulate CO_2, we review below each of your answers in the order of the questions posed.

Your response to **Q1** of our December 10th letter addresses an argument we pointedly and explicitly did not make and sidesteps the argument we did make. You write: "As we stated previously, specific mention of a pollutant in a statutory provision is not a necessary prerequisite to regulation under many CAA statutory provisions." We agreed with this observation in Q3 of our October 14th letter and again in Q1 of our December 10th letter, where we acknowledge that the CAA sensibly allows EPA to regulate substances not specifically mentioned in the CAA when such regulation is necessary to "fill in gaps" in existing regulatory programs. Yet you repeat that observation as though we had taken the position that EPA may not regulate any substance unless it is listed in a regulatory provision of the CAA.

Our point was different, to wit: Congress was quite familiar with the theory of human-induced global warming when it amended the CAA in 1990; and, consequently, the fact that the CAA nowhere lists CO_2 as a substance to be regulated is "evidence" (note: we did not say *proof*) that Congress chose not to authorize EPA to launch a *regulatory* global warming mitigation program. EPA's assertion, that the *absence* of CO_2 from *all* CAA regulatory provisions furnishes *no* evidence against EPA's claim that it may regulate CO_2, strikes us as unreasonable, especially in light of Congress' practice, in amendment after amendment to the CAA, of specifically designating substances for regulation.

In addition, we are troubled by the apparent implication of your statement, "Congress did not in 1990 limit the potential applicability of any of the CAA regulatory provisions to CO_2." You seem to suggest that, if Congress did not expressly forbid EPA from regulating CO_2, EPA must be presumed to have such power. That implication, we think, contradicts the core premise of administrative law, namely, that agencies have no inherent regulatory power, only that which Congress intentionally and specifically delegates.

We do not find persuasive your response to **Q2** of our December 10th letter. We asked, "If Congress intended to delegate to EPA the authority to regulate greenhouse gases, why did it admonish EPA not to assume such authority in the only CAA provisions [sections 103(g) and 602(e)] dealing with CO_2 and global warming?" You answer that those sections are nonregulatory, and that Congress "would not intend the Agency to regulate substances under authorities provided for nonregulatory activities." You then conclude that the admonitory language of those provisions "does not directly or indirectly limit the regulatory authorities provided to the Agency elsewhere in the Act." We agree that the admonitory language does not repeal by implication any existing authority provided elsewhere in the CAA. However, we do not agree that, when Congress enacted that language, it was merely affirming a tautology (i.e., nonregulatory authorities cannot authorize regulatory programs). It is far more likely that Congress meant to caution EPA against assuming an authority that does not in fact exist.

Please again recall the legislative history surrounding Title VI. When Congress enacted Title VI, it also rejected a Senate version known as Title VII, the "Stratospheric Ozone and Climate Protection Act," which would have required EPA to regulate greenhouse gases. The admonitory language of section 602(e) states that EPA's study of the global warming potential of ozone-depleting substances "shall not be construed to be the basis of any additional regulation under this chapter [i.e., the CAA]." This is very significant, because it means Congress was not content just to reject Title VII. Congress also thought it necessary to state in Title VI that it was in no way authorizing a greenhouse gas regulatory scheme.

The admonitory language of section 103(g) is also worth quoting. EPA's whole case boils down to the argument that section 103(g) refers to CO_2 as an "air pollutant," and the CAA authorizes EPA to regulate air pollutants. This argument is incredibly weak. To begin with, under section 302(g) of the CAA, the term "air pollutant" does not automatically apply to any substance emitted into the ambient air. Such a substance must also be an "air pollution agent or combination of such agents." EPA has never determined that CO_2 is an air pollution "agent." More importantly, the admonitory language of section 103(g) is unequivocal: "*Nothing* in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements" (emphasis added). If *nothing* in section 103(g) shall be construed to authorize the imposition of air pollution control requirements, then the reference therein to CO_2 as a "pollutant" should not be construed to be a basis for regulatory action. EPA's case is further undermined by Congressman John Dingell's commentary on the legislative history connected with section 103(g). In his October 5, 1999 letter to Chairman McIntosh, Rep. Dingell wrote: "While it [section 103(g)] refers, as noted in the EPA memorandum, to carbon dioxide as a 'pollutant,' House and Senate conferees never agreed to designate carbon dioxide as a pollutant

for regulatory purposes."

We find disturbing your response to **Q3** of our December 10th letter. Citing the very passage of *Chevron v. NRDC* quoted by EPA in its December 1st letter, we asked whether there was not a vital, practical distinction between EPA's filling a "gap left, implicitly or explicitly, by Congress" in a "congressionally created ... program" and EPA's creating new programs without express Congressional authorization. Your answers to Q3(a) and (b) do not acknowledge that EPA is in any meaningful way constrained by the distinction between filling gaps and creating programs.

In addition, we believe your answer to Q3(c) lacks credibility. We asked whether EPA's authority to control substances based upon their global warming potential "is as clear and certain and unambiguous as EPA's authority to control substances based upon their impact on ambient air quality, their toxicity, or their potential to damage the ozone layer." Rather than acknowledge the obvious (i.e., EPA's regulatory authority with respect to CO_2 rests on a tortuous interpretation at best), you reply that "EPA has not evaluated the strength of the technical and legal basis for such findings under any particular provision of the Act," because it has "no current plans" to regulate CO_2. While that statement is welcome assurance in light of the Knollenberg limitation, it leaves a void as to the legal basis for EPA's view of its authority.

Your answer to **Q4** of our December 10th letter is similarly nonresponsive. We noted that, under CAA section 112(b)(2), EPA may not classify an ambient air pollutant like sulfur dioxide (SO_2) as a hazardous air pollutant (HAP) unless it "independently meets the listing criteria" of section 112. In Q4(a), we asked: "What are the criteria for listing under section 112 that SO_2 and the other ambient air pollutants do not independently meet?" Your reply corrects our formulation by pointing out that an ambient air pollutant may be listed as a HAP only if it is an ambient air pollutant "precursor" and "meets the criteria for listing under section 112(b)(2)." However, you did not state what those criteria are; you did not explain the specific difference between an ambient air pollutant and a HAP. In short, you did not answer our question. The reason, we suspect, is that a clear statement of the criteria that a substance must meet in order to be classified as a HAP would also make clear that CO_2 is unlike any of the substances currently listed as HAPs. That, in turn, would cast grave doubt on EPA's claim that section 112 is "potentially applicable" to CO_2.

Your response to Q4(b) implies that EPA may actually have *greater* flexibility to list CO_2 as a HAP than any section 108 ("ambient") air pollutant, because CO_2 is not listed under section 108 and, thus, is not subject to the qualification that it be a "precursor." We disagree. The ambient air pollution program is the foundation of the CAA. The fact that Congress and EPA did not list CO_2 under section 108 is evidence that CO_2 is not a "pollutant" in any substantive meaning of the word. The HAPs program deals with substances that typically are deadlier or more injurious than ambient air pollutants. However, even at many times current atmospheric levels, CO_2 is a benign substance compared to ambient air pollutants like lead, ozone, or SO_2. Therefore, the fact that Congress and EPA never listed CO_2 as an ambient air pollutant is an argument against CO_2's ever being listed as a HAP.

Your responses to Q4(c) and (d) employ the same flawed reasoning. Section 112(b) provides that no ozone-depleting substance may be classified as a HAP "solely due to its adverse effects on the environment." Noting this restriction, we asked: "[D]oes it not stand to reason that no greenhouse gas may be listed solely due to its adverse environmental effect? Indeed, is not the exemption of greenhouse gases from listing under section 112 even stronger than that for ozone-depleting substances, inasmuch as the CAA nowhere expressly authorized EPA to regulate greenhouse gases?" You replied: "Since section 112 says nothing precluding the listing of greenhouse gases (or, for that matter, any other pollutants not regulated under Title VI) on environmental grounds alone, EPA does not agree with the conclusion in the last sentence of your question." Here again, you come close to saying that EPA may lawfully do anything Congress has not expressly forbidden it to do. We would suggest that Congress did not need to exempt greenhouse gases from EPA's section 112 authority, because Congress never gave EPA authority to regulate greenhouse gases in the first place.

We regard your brief response to **Q5** to be a tacit admission that the HAPs framework is unsuited to control substances that deplete the ozone layer. You comment that "Congress included on the section 112(b)(2) list of HAPs several substances that deplete the ozone layer (e.g., methyl bromide, carbon-tetrachloride [CCL_4])." However, this merely shows that *some* ozone-depleting substances (i.e., those that are carcinogenic, mutagenic, neurotoxic, etc.) independently meet the criteria for listing under section 112. It does not prove that EPA could act effectively to protect stratospheric ozone without new and separate authority (e.g., Title VI). We also note that, in Title VI, Congress did not declare any of the ozone-depleting substances to be an "air pollutant." This suggests that EPA's authority with respect to ozone-depleting chemicals comes from a specific grant by Congress, not from a generalized authority to control substances emitted into the air.

We regard your answer to **Q6** as nonresponsive. We pointed out that stratospheric ozone depletion is, by definition, a phenomenon of the stratosphere, not of the ambient air, and that it differs fundamentally from ambient air pollution in both its causes and remedies. We therefore asked: "In light of the foregoing considerations, do you believe the NAAQS [National Ambient Air Quality Standards] program has any rational application to the issue of stratospheric ozone depletion?" You responded: "Since Title VI adequately addresses stratospheric ozone depletion, EPA has not had any occasion or need to undertake an evaluation of the use of the NAAQS program to address this problem." We believe that Congress' enactment of Title VI is further evidence that the CAA is a carefully structured statute with specific grants of authority to accomplish specific (hence limited) objectives, not an undifferentiated, unlimited authority to regulate any source of any substance that happens to be emitted into the air.

In **Q7**, we asked whether the NAAQS program, because it targets local conditions of the ambient air, is unsuited to address a global phenomenon of the troposphere, such as the supposed enhancement of the greenhouse effect by industrial emissions of CO_2. You replied: "EPA has not reached any conclusion on this question because, as already noted, the Agency has no current plans to propose regulations for CO_2." We do not think it necessary for EPA to start a

rulemaking in order to evaluate whether a particular portion of the CAA is suited to control CO_2 in the context of a global warming mitigation program. We regard your answer as a tacit admission that EPA is unable to rebut our argument.

In your answer to **Q8**, you state: "There is nothing in the text of section 302(h) and we have found nothing in its history to support Mr. Glaser's speculation that the scope of that provision was limited to local or regional air pollution problems" such as those arising from particulate pollution. We disagree. The text in question refers to the effects of pollution on "weather, visibility and climate." As you note in your answer to Q12, CO_2 has never been "associated with visibility concerns." Particulate pollution, on the other hand, can impair visibility as well as affect local or regional weather and climate. As to the legislative history, the source of the phrase "weather, visibility and climate" in the 1970 CAA Amendments would seem to be the National Air Pollution Control Administration's 1969 air quality criteria for particulates, which discussed the interrelated impact of fine particles on weather, visibility and "climate near the ground" (*Air Quality Criteria for Particulate Matter*, Jan. 1969). The climate effects referred to were not global but local and regional in nature. In any event, we find nothing in the text and legislative history of section 302(h) to suggest that Congress intended that provision to address CO_2 in the context of the issue of global warming.

In **Q9**, we asked whether the NAAQS program is fundamentally unsuited to address the issue of global warming, since there seems to be no sensible way to set a NAAQS for CO_2. For example, a NAAQS for CO_2 set below current atmospheric levels would put the entire country out of attainment, even if every power plant and factory were to shut down. Conversely, a NAAQS for CO_2 set above current atmospheric levels would put the entire country in attainment, even if U.S. coal consumption suddenly doubled. You replied: "Since EPA has no current plans to propose regulations for CO_2, the Agency has not fully evaluated the possible applicability of various CAA provisions for this purpose. At this point in time, your question is entirely hypothetical." Whether "hypothetical" or not, our question points out that CO_2 does not seem to fit into the NAAQS framework. We regard your answer as a tacit admission that EPA has no idea how to set a NAAQS for CO_2 in the context of a global warming mitigation program.

In **Q10**, we noted that the attainment of a NAAQS for CO_2 would be impossible without extensive international cooperation, and that EPA had not yet determined whether CAA section 108 authorizes the designation of nonattainment areas where attainment cannot be achieved without international action. From these facts, we drew the reasonable conclusion that, until EPA determines that the CAA does grant such authority, it is "premature" for EPA to claim that section 108 is "potentially applicable" to CO_2. You replied: "Section 108 of the CAA authorizes regulation of air pollutants *if* the criteria for regulation under that provision are met. EPA has not yet evaluated whether such criteria have been met for CO_2. Thus, at this time, we believe it is accurate to state that section 108 (and other CAA provisions authorizing regulation of air pollutants) are 'potentially applicable' to CO_2" (emphasis added). We disagree. The mere fact that EPA has not evaluated whether CO_2 meets section 108 criteria furnishes no evidence that section 108 is potentially applicable to CO_2.

Before examining whether CO_2 meets the criteria for regulation under section 108, EPA would first have to determine whether the CAA authorizes EPA to designate nonattainment areas where attainment cannot be achieved without international action. Also, as noted above, before examining whether CO_2 meets section 108 criteria, EPA would have to resolve the basic conceptual issue of whether setting a NAAQS for CO_2 is possible without putting the entire country either in attainment or out of attainment. Since EPA has not resolved these threshold questions, it is disingenuous to claim that section 108 is "potentially applicable" to CO_2. The most EPA can honestly say at this point is that it *does not know* whether section 108 could be found to be applicable to CO_2.

In **Q11**, noting that unilateral CO_2 emissions reductions by the United States would have no measurable effect on global climate change, we asked whether the NAAQS program can have any application to CO_2 outside the context of an international regulatory regime, such as the Kyoto Protocol, since CAA section 109(b) requires the Administrator to adopt NAAQS that are "requisite to protect" public health and welfare. You replied: "The Clean Air Act does not dictate that EPA must be able to address all sources of a particular air pollution problem before it may address any of those sources. Rather, EPA may address some sources that 'contribute' to a problem even if it cannot address all of the contributors. For example, EPA was not precluded from addressing airborne lead emissions because there are other sources of lead contamination, some of which may be beyond EPA's jurisdiction. *See Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1136 (DC Cir. 1980)." We agree that EPA may address some sources that contribute to a problem even if it cannot address all of the contributors. However, there is a fundamental difference between lead pollution and CO_2 "pollution."

As the D.C. Circuit Court of Appeals observed in the *Lead Industries* case, airborne lead is one of three major routes of exposure, the others being diet and accidental ingestion of lead objects by small children. Accordingly, setting a NAAQS for lead cannot provide comprehensive protection against lead pollution. However, setting a NAAQS for lead can significantly reduce exposure to *airborne* lead. Moreover, reducing airborne lead would also reduce the amount of lead in the nation's food supply -- another major route of exposure. Therefore, it is possible to set a NAAQS for lead that is "requisite" to protect public health. In contrast, setting a NAAQS for CO_2 outside the context of a global treaty cannot significantly reduce (or even measurably slow the growth of) atmospheric concentrations of CO_2, particularly since China alone will soon overtake the U.S. as a source of greenhouse gas emissions. Thus, it is hard to imagine that a NAAQS for only one gas -- CO_2 -- that applies only to the U.S. could satisfy the section 109(b) requirement that it be "requisite" to protect public health and welfare.

In **Q12**, we asked which provisions of the CAA apply to "major stationary sources" and "major emitting facilities," and whether such provisions are among those EPA considers "potentially applicable" to CO_2. You explained that the regulatory requirements of Parts C and D of Title I and Title V of the CAA apply to major stationary sources and major emitting facilities. You also noted that, to be a major stationary source or major emitting facility, an entity must emit an air pollutant that EPA regulates "pursuant to other provisions of the CAA (e.g., if it were a criteria pollutant under section 108)." As you know, section 302(j) defines

"major stationary source" and "major emitting facility" as any stationary facility or source that emits, or has the potential to emit, "one hundred tons per year or more of any air pollutant." It is our understanding that several hundred thousand small and mid-sized businesses and farms individually emit 100 tons or more of CO_2 per year. Regulating CO_2, therefore, would dramatically expand EPA's control over the U.S. economy generally and the small business sector in particular. We are concerned that EPA has an enormous organizational interest in laying the legal predicate for future regulation of CO_2.

In **Q13**, we challenged EPA's reading of the Knollenberg funding limitation. We noted that there is no clear practical difference between issuing regulations for the purpose of reducing greenhouse gas emissions, which EPA claims is legal, and issuing regulations "for the purpose of implementing ... the Kyoto Protocol," which EPA acknowledges is illegal. Rather than speak to the substance of our concern, you refer to previous letters which, in our judgment, also sidestep that concern. We believe that EPA has once again failed to elucidate any criteria that would enable Congress, or other outside observers, to distinguish between legal and illegal greenhouse gas-reducing regulations under the Knollenberg limitation.

In your response to Q13, you also took issue with our understanding of the conditions on which the Senate agreed to ratify the Rio Treaty. We asked: "[W]ould it not have been pointless for the Senate to have insisted, in ratifying the Rio Treaty, that the Administration not commit the U.S. to binding emission reductions without the further advice and consent of the Senate, if it were already in EPA's power to impose such reductions under existing authority?" You replied: "[T]he Senate insisted that the Executive Branch not commit the U.S. to a binding *international* legal obligation (i.e., a treaty obligation) without further advice and consent. The Senate's statement on this point has no bearing on the scope of existing domestic legal authority to address pollution problems as a matter of domestic policy, independent of any international legal obligations." We agree in part, and disagree in part. We agree that the Senate's statement referred to international obligations. Nonetheless, that statement does have a bearing on the scope of EPA's authority.

A major reason for the Senate's instruction was the concern that the Administration might commit to an international agreement that imposes costly burdens on the U.S. and a few other countries while exempting most nations, including major U.S. trade competitors like China, Mexico, and Brazil, from binding emission limitations. Acting on this same concern, the Senate in July 1997 passed the Byrd-Hagel Resolution (S. Res. 98) by a vote of 95-0. Byrd-Hagel stated, among other things, that the U.S. should not be a signatory to any climate change agreement or protocol that would exempt developing nations from binding emissions limits.

Now, if the Senate is overwhelmingly opposed to a climate change treaty that would exempt three-quarters of the globe from binding obligations (even though they emit significant greenhouse gases), it is unthinkable that Congress would support a *unilateral* emissions reduction regime binding upon the U.S. alone. Simply put, when the Senate ratified the Rio Treaty, it did so with the understanding that the Executive Branch would not attempt via

administrative action, executive agreement, or rulemaking to go beyond the Treaty's *voluntary* goals.

In **Q14**, we asked you to account for the fact that, although the Administration claims to regard the science supporting the Kyoto Protocol as "clear and compelling," EPA apparently does not believe the science is strong enough to commence a "formal scientific review process" to determine the appropriateness of domestic regulatory action. Rather than explain how such seemingly inconsistent positions cohere, EPA simply asserts without explanation that there is no incongruity or contradiction.

In summary, with EPA's answers in hand, we are more convinced than ever that the CAA does not authorize EPA to regulate CO_2. As we have stated in previous letters, it is inconceivable that Congress would delegate to EPA the power to launch a CO_2 emissions control program -- arguably the most expansive and expensive regulatory program in history -- without ever once saying so in the text of the statute. We also think it is obvious that the basic structure of the NAAQS program, with its designation of local attainment and nonattainment areas and its call for State implementation plans, has no application to a global phenomenon like the greenhouse effect. Furthermore, in view of the well-known fact that CO_2 is a benign substance and the foundation of the planetary food chain, we are appalled by the Administration's insistence that EPA might be able to regulate CO_2 as a "toxic" or "hazardous" air pollutant.

The CAA is not a regulatory blank check. The Administration's claim that the CAA authorizes regulation of greenhouse gas emissions can only serve to undermine Congressional and public support for legitimate EPA endeavors.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

Ken Calvert

Ken Calvert
Chairman
Subcommittee on
Energy and Environment

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich
The Honorable Joseph Knollenberg
The Honorable James F. Sensenbrenner, Jr.
The Honorable Jerry F. Costello
The Honorable John D. Dingell